Federal Register
Vol. 59, No. 178
Thursday, September 15, 1994

# Presidential Documents

Title 3—

The President

**Presidential Determination No. 94–46 of September 8, 1994**

## Extension of the Exercise of Certain Authorities Under the Trading With the Enemy Act

**Memorandum for the Secretary of State [and] the Secretary of the Treasury**

Under section 101(b) of Public Law 95–223 (91 Stat. 1625; 50 U.S.C. App. 5(b) note), and a previous determination made by me on September 13, 1993 (58 FR 51209), the exercise of certain authorities under the Trading With the Enemy Act is scheduled to terminate on September 14, 1994.

I hereby determine that the extension for one year of the exercise of those authorities with respect to the applicable countries is in the national interest of the United States.

Therefore, pursuant to the authority vested in me by section 101(b) of Public Law 95–223, I extend for one year, until September 14, 1995, the exercise of those authorities with respect to countries affected by:

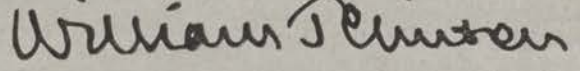
(1) the Foreign Assets Control Regulations, 31 CFR Part 500;

(2) the Transaction Control Regulations, 31 CFR Part 505;

(3) the Cuban Assets Control Regulations, 31 CFR Part 515; and

(4) the Foreign Funds Control Regulations, 31 CFR Part 520.

The Secretary of the Treasury is directed to publish this determination in the **Federal Register**.



THE WHITE HOUSE,
*Washington, September 8, 1994.*

[FR Doc. 94–23034
Filed 9–13–94; 3:12 pm]
Billing code 3810–10–M

# Rules and Regulations

Federal Register
Vol. 59, No. 178
Thursday, September 15, 1994



## DEPARTMENT OF JUSTICE

### 8 CFR Part 3

**[AG Order No. 1916–94]**

### Executive Office for Immigration Review; Board of Immigration Appeals; Expansion of the Board

**AGENCY:** Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule expands the Board of Immigration Appeals to nine permanent members, including eight Board Members and a Chairman. It provides for the designation of three-member panels to adjudicate cases and stay requests. It also provides for a quorum of a majority of the permanent Board for en banc adjudication, and a quorum of a majority of the panel members for panel adjudications. The permanent Board may, by majority vote or at the direction of the Chairman, consider or reconsider en banc any case that was previously decided by a panel. The rule also retains the authority of the Director of the Executive Office for Immigration Review to designate Immigration Judges as temporary additional Board Members.

**EFFECTIVE DATE:** This final rule is effective September 15, 1994.

**FOR FURTHER INFORMATION CONTACT:** Gerald S. Hurwitz, Counsel to the Director, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone: (703) 305–0470.

**SUPPLEMENTARY INFORMATION:** The final rule provides for an expansion of the Board of Immigration Appeals to a nine-member permanent Board. This is necessary because of the Board's greatly increased caseload, which has more than quadrupled over the past decade. To maintain an effective, efficient system of appellate adjudication, it has become necessary to increase the number of Board Members. The most efficient utilization of the Board is through increased use of the panel system, which has been in effect since 1988. This will ensure effective, efficient adjudications while providing for en banc review in appropriate cases.

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b). The Attorney General has determined that this rule is not a significant regulatory action under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Compliance with 5 U.S.C. 553 as to notice of proposed rule making and delayed effective date is not necessary because this rule relates to agency organization and management.

### List of Subjects in 8 CFR Part 3

Administrative practice and procedure, Aliens.

For the reasons set forth in the preamble, 8 CFR part 3 is amended as follows:

## PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

### Subpart A—Board of Immigration Appeals

1. The authority citation for part 3 continues to read as follows:

**Authority:** 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR, 1949–1953 Comp., p. 1002.

2. Section 3.1, paragraph (a)(1), is revised to read as follows:

**§ 3.1 General authorities.**

(a)(1) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review. The Board shall consist of a Chairman and eight other members. The Board Members shall exercise their independent judgment and discretion in the cases coming before the Board. A majority of the permanent Board Members shall constitute a quorum of the Board sitting en banc. A vacancy, or the absence or unavailability of a Board Member, shall not impair the right of the remaining members to exercise all the powers of the Board. The Director may in his discretion designate Immigration Judges to act as temporary, additional Board Members for whatever time the Director deems necessary. The Chairman may divide the Board into three-member panels and designate a presiding member of each panel. The Chairman may from time to time make changes in the composition of such panels and of presiding members. Each panel shall be empowered to review cases by majority vote. A majority of the number of Board Members authorized to constitute a panel shall constitute a quorum for such panel. Each panel may exercise the appropriate authority of the Board as set out in part 3 that is necessary for the adjudication of cases before it. The permanent Board may, by majority vote on its own motion or by direction of the Chairman, consider any case en banc or reconsider en banc any case decided by a panel. By majority vote of the permanent Board, decisions of the Board shall be designated to serve as precedents pursuant to paragraph (g) of this section. There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

* * * * *

Dated: September 6, 1994.

**Janet Reno,**

*Attorney General.*

[FR Doc. 94–22775 Filed 9–14–94; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 92

[Docket No. 93–137–3]

## Importation of Ratites and Hatching Eggs of Ratites

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are adopting as a final rule, with several changes, an interim rule that amended the regulations regarding the importation of ratites and hatching eggs of ratites. In this final rule, we are adding identification and certification requirements to those established by the interim rule. This action is necessary to help ensure that ratites and hatching eggs of ratites that could pose a disease risk to poultry and livestock in the United States are not imported into this country.

EFFECTIVE DATE: October 17, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Keith Hand, Senior Staff Veterinarian, Import-Export Animals Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, room 768, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–5907.

SUPPLEMENTARY INFORMATION:

### Background

The regulations in 9 CFR part 92 (referred to below as the regulations) regulate the importation of certain animals and birds, including ostriches and other flightless birds known as ratites, and their hatching eggs, to prevent the introduction of communicable diseases of livestock and poultry.

In an interim rule effective and published in the **Federal Register** on March 8, 1994 (59 FR 10729–10734, Docket No. 93–137–1), we amended the regulations by providing that ratites and hatching eggs of ratites may not be imported into the United States unless specified identification and recordkeeping requirements regarding their origin and movement are met in the country of export.

We solicited comments concerning the interim rule for a 60-day comment period ending May 9, 1994. On July 5, 1994, we published in the **Federal Register** a notice (59 FR 34375, Docket No. 93–137–2) reopening and extending the comment period until July 20, 1994. We received a total of 10 comments on or before July 20. The commenters included ratite industry associations, a veterinary association, individual members of the general public, and representatives of foreign governments. Five of the commenters supported the rule as written. The other commenters either opposed the rule or suggested modifications to it. We discuss these comments below.

One commenter objected to the fact that ratites may be imported only from countries in which the national government maintains a registry of premises where ratites or ratite hatching eggs are produced for export to the United States. The commenter stated that prohibiting the importation of ratites and ratite hatching eggs from countries that do not meet this requirement will deny Americans access to imports, and might ultimately lead to those countries' erecting trade barriers with the United States. The commenter suggested that the restrictions on importation should apply only to those countries in which smuggling has been demonstrated to have occurred. We are making no changes based on this comment. International trade in ratites and their hatching eggs often involves transhipping birds and eggs among several countries. Without the identification and recordkeeping requirements established by the interim rule, it is difficult to ensure that ratites and hatching eggs of ratites imported into the United States are from pen-raised flocks.

One commenter stated that the interim rule was not warranted by the incidence of disease found in imported ratites. According to the commenter, since the reinstatement of ratite importation [56 FR 31856–31868, Docket No. 90–147, published in the **Federal Register** July 12, 1991 and made effective August 12, 1991], no ostriches have been refused entry due to illness, two shipments of emus have been denied entry due to the detection of Salmonella, and one shipment of cassowaries and emus was denied entry due to the detection of an H5 strain of avian influenza. We are making no changes based on this comment. As we stated in the background information of our interim rule, we consider the quarantine requirements that were in place prior to the interim rule to be effective in identifying and preventing the entry of ratites with communicable diseases. However, as we also stated in our interim rule, the increased risk presented by smuggled or wild-caught ratites jeopardizes the health of other ratites in quarantine and unnecessarily increases the risk of the entry of a ratite with a communicable disease.

Several commenters objected to the requirement that ratites produced in a flock from which ratites or hatching eggs of ratites are intended for importation into the United States be identified with an identification number by means of a microchip implanted in the pipping muscle at 1-day of age. One commenter stated that, although ostriches at birth have a relatively large neck and a bulbous pipping muscle, emu and rhea chicks have very slender necks with no visible pipping muscle, and are too small at birth to safely undergo implantation of a microchip. We do not agree that a microchip cannot be safely implanted in newly hatched emus and rheas. However, we agree with the commenter that the bulbous pipping muscle of the ostrich is not present in emus and rheas. Therefore, we are amending the regulations at § 92.101(b)(3)(i)(B) to require that a microchip be implanted in the pipping muscle of each ostrich produced in a flock from which ratites or hatching eggs of ratites are intended to be imported into the United States, and that a microchip be implanted in the upper neck of ratites other than ostriches. We consider it necessary to implant the microchip in either the pipping muscle or the upper neck to facilitate reading of the microchip.

Another commenter recommended that if the microchip is not implanted in the pipping muscle, the exact location of the microchip should be indicated on a stock registry, on an export certificate, and on an external form of identification on the ratite. We do not consider such information necessary if the microchip is implanted as discussed in the preceding paragraph.

One commenter also recommended that, for what the commenter termed "practical reasons," microchipping be required not when the chick is 1-day of age, but rather either within 1 day of the chick leaving the hatcher or, in the event of natural breeding and hatching, within 7 days of the chick's hatching. We are making no changes based on this comment. We consider microchipping at the earliest possible date after hatching necessary to enable inspectors to ensure that all ratites in a flock are properly identified and are entered in the flock's register. We are unaware of any reason such microchipping cannot be done when the chicks are 1-day of age.

One commenter suggested that the Animal and Plant Health Inspection Service (APHIS) should specify a location for implantation of microchips on older birds as well as chicks. The commenter stated that if ratites at some time become a source of food, it will be

necessary to locate and remove the microchips, and that a standard location for implantation will facilitate that removal. We are making no changes based on this comment. Our experience enforcing the regulations has shown that relatively few ratites other than hatching eggs and chicks are imported into the United States. Those that are imported cannot at present be used for food, under U.S. Environmental Protection Agency regulations, because they are required by APHIS to be treated with a pesticide. Some of the relatively few older ratites imported into the United States, particularly emus, have already been microchipped by their owners for security purposes. These microchips have often been implanted other than in the neck of the ratites, and we do not believe it is necessary to require that the ratites be microchipped a second time.

One commenter stated that the issue of the potential migration of implanted microchips within ratites should be evaluated. We recognize the possibility of the migration of an implanted microchip within a ratite. At this time, however, we consider microchip implantation to be the most reliable practical means of identifying ratites. Should an implanted microchip migrate from the area of implantation, it can still be located and read, although with greater difficulty than if it had not migrated. We recognize that it is possible that more effective means of identification may be developed in the future, and we will evaluate each method of identification as it is developed and tested.

One commenter stated that, although using microchips for identification of ratites is more effective than banding the ratites, the only sure way of identifying ratites is through "DNA fingerprinting," by having a blood sample analyzed at a laboratory. The commenter stated that microchips can be removed from one bird and placed in another, can migrate in a bird's body, and can become inactivated due to bumping or other harsh action. According to the commenter, DNA fingerprinting could be done as needed, with a certain number of "fingerprints" done randomly to ensure that breeders and importers are "kept honest." We are making no changes based on this comment. Although we agree that "DNA fingerprinting" can be an effective means of identification, it does not offer the necessary speed of identification provided by microchipping.

Our interim rule contained a requirement that each hatching egg produced in a flock from which ratites or hatching eggs of ratites are intended to be imported into the United States be marked in indelible ink with the date of production. One commenter recommended that these hatching eggs also be marked with a code identifying the premises of origin. We agree that such an identifying code would help ensure that hatching eggs have originated in the flock indicated on the export certificate, and we believe it would further aid identification of hatching eggs if each egg is identified as to the country of the flock of origin. Therefore, we are amending § 92.101(b)(3)(i)(C) to require that, on the date it is produced, each hatching egg produced in the flock be marked with indelible ink with the date of production, and also be identified with indelible ink as to the country and the premises of the flock of origin. This identification must be in a form assigned by the national government of the country in which the flock is located.

One commenter recommended that the regulations require that microchip readers provided to APHIS inspectors at the intended port of entry be capable of reading microchips produced by different manufacturers, so that APHIS inspectors would not have to maintain a number of different readers. We are making no changes based on this comment. Although we encourage standardization of microchips and readers, even if such standardization does not occur, it will not be necessary for APHIS inspectors to maintain a number of readers. Under the regulations, each importer of ratites is responsible for providing to APHIS inspectors the reader compatible with the microchips used for identification.

Our interim rule included a requirement that a production ceiling for each premises be set, based on the number of eggs the ratites in a flock could reasonably be expected to produce over a given production season. We defined *production season* as that period of time, usually approximately 9 months each year, from the time ratites in a flock begin laying eggs until the ratites cease laying eggs. We stated in the background information to the interim rule that ratites by nature follow a set cycle for laying eggs, and, for reasons of health and productivity, must be given a period of rest between production seasons. One commenter disagreed with our definition of *production season*, and stated that a compulsory "rest period" is not necessary, because some farmers might deliberately manage their flocks in such a way as to export eggs throughout the entire year. We are making no changes based on this comment. Our definition of *production season* does not require a rest period. It merely describes what is standard practice in the ratite industry. However, it should be noted that § 92.101(b)(3)(i)(H) prohibits the addition of ratites to a flock during a production season. Therefore, a "rest period" is necessary if an owner wishes to add ratites to his or her flock from outside the flock.

Our interim rule included a requirement that the owner or manager of a premises from which ratites or hatching eggs of ratites are intended for importation into the United States maintain on a daily basis a register of the numbers of ratites and hatching eggs in the flock and the identification of the ratites. The interim rule required further that the owner or manager submit these registers to the National Veterinary Service of the country of export on a quarterly basis, and that the national government in turn submit a copy of the registers to the APHIS Administrator on a quarterly basis. One commenter stated that these registers will be of no use to the APHIS Administrator because, under the regulations, ratites from outside a flock may not be added to that flock during a production period. We do not agree that copies of the registers would be of no use to APHIS. A copy of a register would be useful to APHIS in those cases where there is some question as to whether a premises has exceeded its production ceiling. However, we agree it will not be necessary for APHIS to examine copies of registers in all cases. Therefore, in this final rule, we are amending § 92.101(b)(3)(i)(E) to remove the requirement that registers be submitted on a quarterly basis, and to require, instead, that the National Veterinary Service of the country of export make copies of the registers available upon request to the Administrator.

Under § 92.101(b)(3)(i)(J) of the regulations established by the interim rule, when the National Veterinary Service of the country of export submits to APHIS copies of registers on a quarterly basis, it also must indicate whether all ratites and hatching eggs of ratites on a premises are identified as required. Because in this final rule we are removing the requirement that registers be submitted on a quarterly basis, we are also removing the requirement in § 92.101(b)(3)(i)(J) that the country of export indicate on a quarterly basis whether all ratites and hatching eggs of ratites are identified as required. However, as required by the interim rule, some of this information is available to APHIS through other certification. In §§ 92.104(c) and (d), an export certificate must include, among other things, certification that all ratites

in the flock of origin have been identified as required. In this final rule, we are adding to §§ 92.104(c) and (d) the requirement that the export certificate also include certification that all hatching eggs in the flock of origin have been marked as required.

One commenter, a representative of a country from which ratites and hatching eggs of ratites are imported into the United States, stated that it is important to reduce the annual ceiling for a flock if laying ratites are removed from the premises. We agree that, because the production ceiling for a flock is dependent on the number of ratites mature enough to lay eggs, the ceiling should be reduced if laying hens are removed from the flock. We are therefore adding to §§ 92.104(c)(15) and (d)(11) the requirement that the export certificate that accompanies shipments of ratites or hatching eggs of ratites to the United States indicate the number of ratite laying hens in the flock of origin. We are also revising § 92.101(b)(3)(i)(I) to require that the production ceiling be adjusted according to changes in the number of laying hens in the flock.

One commenter stated that the keeping of a control register for identification of ratites should not necessarily be the responsibility of the official veterinary authority of the country of exportation, but should instead be allowed to be the responsibility of a recognized body, as agreed upon by the APHIS Administrator. It is not clear to us what type of "recognized body" the commenter is referring to. We do not consider it appropriate for an entity other than an agency of the national government of the country of export to maintain the required registry. Under the regulation as written, a government agency other than the official veterinary authority is not precluded from maintaining the registry of premises that wish to export ratites or hatching eggs of ratites to the United States. Therefore, we are making no changes based on this comment.

Several commenters addressed issues outside the scope of the interim rule, concerning functions required to be carried out by veterinarians in the country from which the ratites or hatching eggs are to be exported. The functions the commenters addressed were already required under the regulations prior to publication of the interim rule.

**Miscellaneous**

We are making a wording correction to § 92.104(c)(14). The provisions in § 92.104(c) pertain to ratites other than hatching eggs that are intended for importation into the United States. However, in § 92.104(c)(14) of our interim rule, we made reference to "hatching eggs" when our intent, consistent with the rest of § 92.104(c), was to refer to "ratites." In this final rule, we are correcting this reference.

In this final rule, we are also making several nonsubstantive changes to part 92, to update addresses in footnotes and to correct an incorrect paragraph reference.

Therefore, based on the rationale set forth in the interim rule and in this document, we are adopting the provisions of this interim rule as a final rule, with the changes discussed in this document.

**Executive Order 12866 and Regulatory Flexibility Act**

This final rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866, and, therefore, has not been reviewed by the Office of Management and Budget.

This final rule requires that foreign producers of ratites or ratite hatching eggs intended for importation into the United States identify all ratite eggs in the flock as to premises and country. It also requires that such identification be certified on an export certificate, that the export certificate also indicate the number of ratite laying hens in the flock, and that the production ceiling for a flock be adjusted according to changes in the number of laying hens in the flock.

At present 99 ratite farms in 13 countries are approved to ship ratites or ratite hatching eggs to the United States. The number of approved foreign farms varies each month due to annual recertification requirements.

We anticipate that requiring the identification and certification set forth in this rule will have little or no economic impact. Hatching eggs must already be marked on the premises of origin as to date of production. The additional cost to also identify the hatching eggs as to premises and country is expected to be negligible. Also, the certification required by this rule is in addition to certification already required on an export certificate, and is expected to have little or no economic impact.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

**Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. *et seq.*), the information collection or recordkeeping requirements included in this rule have been submitted for approval to the Office of Management and Budget.

**List of Subjects in 9 CFR Part 92**

Animal disease, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 9 CFR part 92 that was published at 59 FR 10729–10734 on March 6, 1994, is adopted as a final rule with the following changes:

## PART 92—IMPORTATION OF CERTAIN ANIMALS AND POULTRY PRODUCTS; INSPECTION AND OTHER REQUIREMENTS FOR CERTAIN MEANS OF CONVEYANCE AND SHIPPING CONTAINERS THEREON

1. The authority citation for part 92 continues to read as follows:

**Authority:** 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102–105, 111, 114a, 134a, 134b, 134c, 134d, 134f, 135, 136, and 136a; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 92.101, paragraphs (b)(3)(i)(B) and (b)(3)(i)(C), the second sentence of (b)(3)(i)(E), and the second sentence of (b)(3)(i)(I) are revised to read as set forth below; paragraph (b)(3)(i)(J) is amended by removing the reference to "(b)(3)(i)(D) and (b)(3)(i)(E)" and adding "(b)(3)(i)(B) and (b)(3)(i)(C)" in its place; and paragraph (b)(3)(i)(J) is amended by removing the word "quarterly" in the last sentence.

**§ 92.101 General prohibitions; exceptions.**

* * * * *

(b) * * *

(3) * * *

(i) * * *

(B) Each ratite produced in the flock is identified with an identification number by means of a microchip implanted at 1-day of age in the pipping muscle of ostriches and in the upper neck of other ratites, each ratite added from outside the flock is identified in like manner upon arrival in the flock,

except that the microchip need not be implanted in the pipping muscle or the upper neck, and each ratite already in the flock as of March 8, 1994 is identified in like manner, prior to the next visit to the flock premises by an APHIS representative under § 92.103(a)(2)(iii), except that the microchip need not be implanted in the pipping muscle or the upper neck;

(C) On the date it is produced, each hatching egg produced in the flock is marked in indelible ink with the date of the production, and with identification, assigned by the national government of the country of export, of the premises and country from which the ratites or hatching eggs are intended for exportation;

* * * * *

(E) * * * The country of export in turn submits a copy of the registers to the Administrator upon his or her request;[2]

* * * * *

(I) * * * The ceiling for each premises is calculated jointly by a full-time salaried veterinary officer of the national government of the country of export and the APHIS representative who conducts the site visit required under § 92.103(a)(2)(iii), and is adjusted jointly by an APHIS representative and a full-time salaried veterinary officer of the national government of the country of export according to changes in the number of laying hens in the flock;

* * * * *

**§ 92.103 [Amended]**

3. In § 92.103, footnote 9 is revised to read "The addresses of USDA quarantine facilities may be found in telephone directories listing the facilities or by contacting the Administrator, c/o Import-Export Animals Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782."

4. Section 92.104 is amended by redesignating paragraphs (c)(15) and (c)(16) as paragraphs (c)(16) and (c)(17), respectively; by adding new paragraphs (c)(15) and (d)(11); and by revising paragraphs (c)(14) and (d)(10), to read as follows:

**§ 92.104 Certificate for pet birds, commercial birds, zoological birds, and research birds.**

* * * * *

(c) * * *

(14) That all ratites in the flock from which the ratites come were identified in accordance with § 92.101(b)(3)(i)(B), and that all ratite hatching eggs in the flock were identified in accordance with § 92.101(b)(3)(i)(C);

(15) The number of ratite laying hens in the flock from which the ratites come;

* * * * *

(d) * * *

(10) That all ratites in the flock from which the hatching eggs come were identified in accordance with § 92.101(b)(3)(i)(B), and that all ratite hatching eggs in the flock were identified in accordance with § 92.101(b)(3)(i)(C).

(11) The number of ratite laying hens in the flock from which the hatching eggs come.

**§ 92.106 [Amended]**

5. Section 92.106 is amended by revising footnote 11 to read "A list of approved vaccines is available from the Administrator, c/o Import-Export Animals Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782."

Done in Washington, DC, this 9th day of September 1994.

**Terry L. Medley,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 94-22849 Filed 9-14-94; 8:45 am]

BILLING CODE 3410-34-P

[2] Copies should be mailed to Administrator, c/o Import/Export Animals Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

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## 9 CFR Part 94

**[Docket No. 94-083-1]**

## Change in Disease Status of Portugal Because of BSE

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending our regulations by adding Portugal to the list of countries where bovine spongiform encephalopathy (BSE) exists, because the disease has been detected in native cattle in that country. The effect of this action is to prohibit or restrict the importation of certain fresh, chilled, and frozen meat, and certain other animal products and animal byproducts from ruminants which have been in Portugal. This action is necessary to reduce the risk that BSE could be introduced into the United States.

**DATES:** Interim rule effective September 9, 1994. Consideration will be given only to comments received on or before November 14, 1994.

**ADDRESSES:** Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 94-083-1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Dr Kathleen Akin, Senior Staff Veterinarian, Import-Export Products Staff, National Center for Import-Export, Veterinary Services, APHIS, USDA, room 755, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. (301) 436-7830

**SUPPLEMENTARY INFORMATION:**

### Background

The regulations in 9 CFR parts 94 and 95 (referred to below as the regulations) govern the importation of meat, animal products, animal byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including bovine spongiform encephalopathy (BSE).

Bovine spongiform encephalopathy is a neurological disease of bovine animals and other ruminants. BSE is not known to exist in the United States.

The major means of spread of BSE appears to be through the use of ruminant feed containing protein and other products from ruminants infected with BSE. Therefore, BSE could become established in the United States if materials carrying the BSE agent, such as certain meat, animal products, and animal byproducts from ruminants in countries in which BSE exists, are imported into the United States and are fed to ruminants in the United States.

Sections 94.18 and 95.4 of the regulations prohibit and restrict the importation of certain meat, animal products, and animal byproducts from ruminants which have been in countries in which BSE exists. These countries are listed in § 94.18 of the regulations.

In an interim rule effective on December 7, 1993, and published in the **Federal Register** on December 13, 1993 (58 FR 65103-65104, Docket No. 93-149-1), we amended the regulations by adding Portugal to the list of countries where BSE exists after the disease was detected in cattle in Portugal. In a final rule effective on May 27, 1994, and

published in the **Federal Register** on May 12, 1994 (59 FR 24637–24638, Docket No. 93–149–2), we amended the regulations by removing Portugal from the list of countries where BSE exists after epidemiological investigations revealed that the cattle in which the disease was detected had been imported into Portugal from Great Britain, and that all suspect animals were destroyed. Since February 1990, the Portuguese government has prohibited the importation of live cattle and all animal products and animal byproducts from Great Britain, Northern Ireland, and the Republic of Ireland. Additionally, all livestock in Portugal, both domestic and imported, are subject to official supervision and veterinary controls established at the national level.

Recently, Portuguese government veterinarians with the National Veterinary Laboratory in Lisbon reported to the Office of International Epizootics that BSE has been detected in cattle born in Portugal. A limited number of cases of BSE were confirmed by histopathological examination according to standardized procedures for the diagnosis of BSE. Portuguese government veterinarians confirmed the cases of BSE in native cattle born in Portugal. The exposure of these cattle to the BSE agent could only have been while in Portugal. In order to reduce the risk of introducing BSE into the United States, we are, therefore, adding Portugal to the list of countries where BSE is known to exist. Thus, we are prohibiting or restricting the importation of certain fresh, chilled, and frozen meat, and certain other animal products and animal byproducts from ruminants which have been in Portugal.

**Immediate Action**

The Administrator of the Animal and Plant Health Inspection Service has determined that there is good cause for publishing this interim rule without prior opportunity for public comment.

BSE is a serious animal disease that has caused great loss to the cattle industry of Great Britain, and the introduction of this disease into the United States would cause great harm to the U.S. cattle industry. BSE has been diagnosed in cattle in Portugal. The restrictions contained in this interim rule must be implemented immediately to reduce the risk that BSE could be introduced into the United States through importation of certain meat, animal products, and animal byproducts from ruminants that have been in Portugal.

Because prior notice and other public procedures with respect to this action are impracticable and contrary to the public interest under these conditions, we find good cause under 5 U.S.C. 553 to make it effective upon signature. We will consider comments that are received within 60 days of publication of this interim rule in the **Federal Register**. After the comment period closes, we will publish another document in the **Federal Register**. It will include discussion of any comments we receive and any amendments we are making to the rule as a result of the comments.

**Executive Order 12866 and Regulatory Flexibility Act**

This interim rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review process required by Executive Order 12866.

As an alternative to the provisions of this rule, we considered taking no action. This alternative was rejected because it would allow meat, animal products, and animal byproducts that might spread BSE to be imported into the United States. Placing Portugal on the list of countries in which BSE is known to exist restricts the importation of some animal products and prohibits the importation of others. Currently, natural non-stomach bovine casings are the only commodity imported from Portugal in quantities sufficient to cause any economic impact.

During FY 1992/93, according to the Economic Research Service, U.S. Department of Agriculture, 14,846 metric tons of animal casings were imported by the United States, of which 82 percent came from hogs. Portugal exported 229 metric tons of casings to the United States during this period, or only 1.5 percent of the total imported. In the opinion of the animal casings industry, a very small proportion of the animal casings imported from Portugal are bovine; most come from hogs and sheep. This rule will not affect the importation of hog and sheep casings from Portugal. Therefore, this rule change will not have a significant impact on U.S. entities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

**Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

**Paperwork Reduction Act**

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**List of Subjects in 9 CFR Part 94**

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, 9 CFR part 94 is amended as follows:

## PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), VELOGENIC VISCEROTROPIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, HOG CHOLERA, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for part 94 continues to read as follows:

**Authority:** 7 U.S.C. 147a, 150ee, 161, 162, and 450; 19 U.S.C. 1306; 21 U.S.C. 111, 114a, 134a, 134b, 134c, 134f, 136, and 136a; 31 U.S.C. 9701; 42 U.S.C. 4331, 4332; 7 CFR 2.17, 2.51, and 371.2(d).

**§ 94.18 [Amended]**

2. In § 94.18, paragraph (a) is amended by adding "Portugal," immediately after "Oman,".

Done in Washington, DC, this 9th day of September 1994.

**Terry L. Medley,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 94–22850 Filed 9–14–94; 8:45 am]

BILLING CODE 3410–34–P

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

### Small Business Size Standards; Environmental Remediation Services

**AGENCY:** Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The Small Business Administration (SBA) is establishing a size standard of 500 employees for Environmental Remediation Services, an activity which involves work identified with a number of different functions associated with restoring a contaminated environment, such as: preliminary assessment, site inspection, testing, remedial investigation, containment, remedial action, the

transportation and disposal of waste materials, and security and site closeouts. The application of this size standard will be for Federal environmental remediation procurements which involve three or more environmentally related activities which in turn can be identified in separate industries under the Standard Industrial Classification (SIC) system. It will also apply in SBA's non-procurement programs where an applicant firm is primarily engaged in environmental remediation services as defined by this final rule.

The adopted size standard of 500 employees is, in practical effect, an increase above the size standard of $18.0 million proposed on October 8, 1993 (58 FR 52452). This higher size standard is supported by more recent data describing the industry structure for this activity, as well as by comments received in response to the proposed rule.

**DATES:** Effective Date: This rule is effective on October 17, 1994.

Applicability Dates: This rule applies to all Federal procurement solicitations, except noncompetitive Section 8(a) contracts, issued on or after October 17, 1994.

For Section 8(a) noncompetitive contracting actions, the rule is applicable to offers of requirements that are accepted by the Small Business Administration subsequent to October 17, 1994.

**FOR FURTHER INFORMATION CONTACT:** Gary M. Jackson, Assistant Administrator for Size Standards, (202) 205–6618.

**SUPPLEMENTARY INFORMATION:** On October 8, 1993 the SBA proposed to establish an environmental services size standard of $18.0 million for Federal government procurements meeting the following two criteria: (1) That the overall purpose of the procurement is to restore a contaminated environment, and (2) that the procurement is composed of activities in three or more distinct industries identified with separate Standard Industrial Classification (SIC) four-digit industry codes, none of which constitutes 50 percent or more of the contract's value (58 FR 52452). These criteria were established to distinguish environmental remediation services involving multiple activities from other environmental related procurements involving services primarily associated with one particular industry. For non-procurement applications of this size standard, a firm would have to be primarily engaged in three or more activities related to environmental remediation, none of which accounts for 50 percent or more of the firm's activities. The environmental services activity was designated as a sub-category under SIC code 8744, Facilities Support Management Services, because this SIC code generally requires the performance of a range of different services in support of facilities where no one activity may be considered the primary activity (see Standard Industrial Classification Manual: 1987, Executive Office of the President, Office of Management and Budget).

In this final rule, SBA is adopting a size standard of 500 employees (equivalent to approximately $50 million in annual receipts) for environmental remediation services, rather than the $18 million size standard set forth in the October 8, 1993 proposed rule identified above. This increase takes into account comments received on the proposed size standard, an analysis of additional industry data on firms engaged in environmental remediation, and trends in Federal procurement for this type of activity. These factors are discussed in greater detail below.

In addition, SBA has changed the title for this activity from "Environmental Services," the title used in the SBA's proposed rule, to "Environmental Remediation Services." This stems from comments that environmental services as a title is very broad and could result in a misclassification of Federal procurements simply because the title is not sufficiently specific. After reviewing the proposed definition for environmental services, SBA is changing the title to "Environmental Remediation Services," a title believed to better specify the type of services for which the SBA intended to establish a separate, distinct size standard. The proposed rule was directed towards remediation services, and not all other possible services that could be performed in connection with the environment. This definitional modification is for clarification purposes only.

As discussed in the proposed rule, SBA views environmental remediation services as an emerging industry not explicitly defined under the present SIC system. Pursuant to the authority set forth in section 15(a) of the Small Business Act, 15 U.S.C. 644(a), SBA will consider establishing a further segmentation of an industry category defined in the four-digit SIC system to recognize a new industry. In the past, SBA has established other sub-categories within existing four-digit SIC industries (e.g., base maintenance, dredging, pneumatic tires, custom cattle feedlots and food services). In this case, SBA is establishing a separate sub-category under SIC code 8744 because of a need to establish a specific size standard for the emerging multi-discipline activity of environmental remediation services, an area of Federal procurement that has expanded enormously in recent years.

SBA received a total of 69 comments to the proposal to establish an $18 million size standard for environmental remediation services. Twenty-three comments supported SBA's proposed rule in all respects without reservation. Among the 62 comments discussing the $18 million size standard, 21 comments argued for a higher size standard, 10 comments wanted a lower size standard, and 31 comments generally supported the proposed $18 million size standard. Fifteen of the 21 comments supporting a higher size standard also argued for a size standard based on number of employees. Other comments raised alternatives to the proposed size standard, or opposed the establishment of any specific size standard for environmental remediation services. A discussion of these latter comments and SBA's views regarding them will follow a discussion of SBA's basis for establishing a 500 employee size standard for environmental remediation services.

**Selection of Size Standard**

The SBA has decided to establish a 500 employee size standard for environmental remediation services. SBA now believes the proposed $18 million size standard does not adequately reflect the structure of the environmental remediation services industry as revealed by available data on firms engaged in environmental remediation services. The decision to propose an $18 million size standard was based primarily on the premise that, from limited information available at that time, firms which perform environmental remediation services tend to be larger in size than firms performing non-environmental services in related industries. Accordingly, a size standard which reflected a level similar to the highest size standards then in effect for any of the related construction or services industries was proposed. Since the time of the proposed rule, SBA continued in its efforts to assemble the most recent data available on environmental firms. The assessment of this newly developed data, as well as public comments in response to the proposed size standard, has convinced SBA that a 500 employee size standard would be more suitable for the environmental remediation services industry than an $18 million size

standard. The analysis of the industry data, and the basis for the decision to use number of employees as the measure of size, are each discussed below.

**Analysis of Industry Data**

In considering the appropriate size standard for an industry, SBA generally evaluates the structural characteristics of an industry by analyzing at least four industry factors. These industry factors include: Average firm size, start-up costs, competition and the distribution of firms by size. In addition, the impact of alternative size standards on SBA's programs is assessed. As a relatively new and developing industry, comprehensive industry data by which to conduct this structural analysis are limited for the environmental remediation services industry. The statistical collection agencies of the Federal government, the primary sources of economic data on industries in the economy, do not publish data on environmental remediation services firms since this activity has not yet been identified as an industry under the SIC system. To overcome this problem, SBA has constructed its own data base of environmental remediation services firms based on data from a non-governmental source. SBA believes this data base is sufficient in coverage to provide an adequate assessment of the relevant structural characteristics of the environmental remediation services industry.

SBA constructed its data base by utilizing data and information published in the 1993 edition of Wards Business Directory. This publication is viewed by the SBA as the best single data base currently available to identify firms engaged in environmental remediation services. This directory lists individual firms by SIC code, provides a description of a firm's activities, and shows the size of a firm by revenues and number of employees. From the description of firm activities, SBA was able to identify firms that perform activities associated with environmental remediation services. Firms in nine industries, considered the primary industries from which firms perform some or all aspects of environmental remediation work, were reviewed to identify environmental remediation services firms. The nine industries reviewed are listed below:

| SIC code | Description |
|---|---|
| 1629 ..... | Heavy Construction, Not Elsewhere Classified. |
| 1795 ..... | Wrecking and Demolition Work. |
| 1799 ..... | Special Trade Contractors, Not Elsewhere Classified. |
| 4212 ..... | Local Trucking Without Storage. |
| 4953 ..... | Refuse Systems. |
| 4959 ..... | Sanitary Services, Not Elsewhere Classified. |
| 8711 ..... | Engineering Services. |
| 8731 ..... | Commercial Physical and Biological Research. |
| 8734 ..... | Testing Laboratories. |

Data on these firms were then combined to derive information on the structure of the environmental remediation services industry.

Although data obtained from the Wards Business Director provided SBA with useful information on firms performing environmental remediation services, the directory does not include all firms within an industry. Instead, it tends to omit many smaller-sized firms in an industry, thereby creating a bias in the data towards larger-sized firms. In view of this aspect of the data, SBA's analysis of industry characteristics focused on the relative differences between environmental and non-environmental remediation services firms rather than on absolute values calculated from the Wards data. SBA believes that Wards data provide a reasonably accurate picture of the relative difference in average firm size between industries. If the Wards data show that the average firm size of one industry is twice that of another industry, it is likely to be accurate, even if the absolute values listed are not truly representative of each industry as a whole.

In performing the analysis of this size standard, the relative differences of the four industry factors identified above were calculated between the derived environmental remediation services industry and a comparison industry group. The comparison industry group data was also derived from the Wards Business Director and consisted of the firms within the same nine SIC codes listed above which were not shown as engaged in environmental remediation work. From these differences, a range of size standards was indicated based on relationships between relative industry differences and size standards for the non-manufacturing industries. This analytical approach was necessary to accommodate the data limitations discussed earlier. The remainder of this section describes in greater detail the analysis of relative differences performed by SBA in establishing this size standard.

A total of 374 firms within the nine SIC codes identified above were found to be engaged in environmental remediation services. An environmental remediation services industry was constructed by aggregating data on these firms into one industry group. Structural characteristics of this industry then were estimated. Industry values were calculated for each of the four industry factors—average firm size (as measured by average revenues per firm), start-up costs (using average assets per firm to measure capital typically employed by firms in an industry), competition (as measured by percent of total industry revenues attributed to large firms with 1000 or more employees), and the distribution of firms by size (as measured by the market share of total industry revenues obtained by firms with revenues of more than $5 million and more than $18 million). Table 1 below summarizes the industry characteristics of this derived environmental remediation services industry, the industry characteristics of a comparison group (identified as the parent industry group), and the difference between the characteristics of these two groups (as expressed by a ratio).

TABLE 1.—CHARACTERISTICS OF THE ENVIRONMENTAL REMEDIATION SERVICES INDUSTRY AND PARENT INDUSTRY GROUP

| | (A) Environmental remediation services | (B) Parent industry group | (C) Difference ratio (A÷B) |
|---|---|---|---|
| Average Revenues Per Firm | $115.4M | $36.4M | 3.17 |
| Average Assets Per Firm | $59.5M | $16.8M | 3.54 |
| Competition | 84.7% | 67.1% | 1.26 |
| Percent of Revenues by Firm Size Greater Than: | | | |
| $5 Million | 99.2% | 96.2% | 1.03 |
| $18 Million | 97.1% | 74.4% | 1.31 |

TABLE 1.—CHARACTERISTICS OF THE ENVIRONMENTAL REMEDIATION SERVICES INDUSTRY AND PARENT INDUSTRY GROUP—Continued

| | (A) Environmental remediation services | (B) Parent industry group | (C) Difference ratio (A+B) |
|---|---|---|---|
| Average | N/A | N/A | 1.17 |

Source: Data derived from 1993 Wards Business Directory. Average assets estimated by SBA based on Wards Directory and Industry Norms and Key Business Ratios, Dun and Bradstreet, 1986.

The relative difference between structural characteristics of the environmental remediation services and the parent industry group can be expressed quantitatively as a "difference ratio," and is shown in table 1 for each industry factor. The difference ratio is simply the value of an industry factor for the environmental remediation services industry divided by the value of the same industry factor for the parent industry group (i.e., the difference ratio for the industry factor of average firm size is: $115.4 million + $36.4 million = 3.17). As can be seen in table 1, the difference ratios range between 1.03 and 3.53.

The relative differences clearly show that the environmental remediation services industry is comprised of larger firms than are present in the parent industry group, and that larger firms capture a greater share of total industry revenues in the environmental remediation services industry than in the parent industry group. The implication of these findings is that the environmental remediation services industry warrants a higher size standard than is generally in effect for the nine parent industries.

The next step in the analysis was to calculate a weighted average size standard for the nine SIC codes making up the parent industry group. The nine parent industries have widely varying size standards, ranging between $2.5 million for engineering services (SIC code 8711) to 500 employees for research and development (SIC code 8731). To create a single size standard for environmental remediation services based on data comparisons with the parent industry group, a single size standard representing the varying size standards of the industries within that group needed to be derived. To obtain such a single size standard, a weighted average of the size standards for the nine parent industries was calculated.

Based on the current size standards, and weighting each industry by the total number of firms in the industry as reported by the U.S. Bureau of the Census, a weighted average size standard of $12 million was calculated based on annual revenues (the actual calculated figure of $11.95 million was rounded up). Since the size standard for research and development is based on number of employees, it was first converted to a receipts size standard by multiplying the 500 employee size standard by the revenues per employee for that industry.

A weighted average size standard based on number of employees was also calculated to assist in the analysis. To make this calculation, the receipts-based size standards were first converted to number of employees by dividing the receipts size standards by revenues per employee for each industry (for the industries of SIC codes 4953 and 4959, revenues per employee for all private sector industries was used in the absence of current revenue data on these two specific industries). Using employee equivalent size standards for eight of the nine industries, a size standard of 141 employees was calculated (the actual calculated figure of 141.1 employees was rounded down).

These two weighted average size standards became the base size standards ($12 million and 141 employees) by which to estimate how much higher the size standards should be for environmental remediation services than for the parent industry group based upon the relative industry differences shown in Table 1. Table 2 below shows the calculations used in developing the weighted average size standards.

TABLE 2.—WEIGHTED AVERAGE SIZE STANDARDS FOR THE PARENT INDUSTRIES

| SIC | Size standard | | No. of firms | Percent of total firms | Composite | |
|---|---|---|---|---|---|---|
| | Receipts | Employees [1] | | | Receipts | Emp. |
| 1629 | $17.0M | 162 | 10,088 | 9.3 | $1.57M | 15.0 |
| 1795 | 7.0M | 92 | 865 | 0.8 | 0.06M | 0.7 |
| 1799 | 7.0M | 91 | 23,181 | 21.3 | 1.49M | 19.4 |
| 4212 | 18.5M | 235 | 37,145 | 34.1 | 6.31M | 80.2 |
| 4953 | 6.0M | 45 | 2,208 | 2.0 | 0.12M | 0.9 |
| 4959 | 5.0M | 38 | 852 | 0.8 | 0.04M | 0.3 |
| 8711 | 2.5M | 29 | 28,494 | 26.2 | 0.65M | 7.5 |
| 8734 | 5.0M | 79 | 2,844 | 2.6 | 0.13M | 2.0 |
| 8731 | [2] 52.7M | 500 | 3,265 | 3.0 | 1.58M | 15.0 |
| Total | ..... | ..... | 108,942 | 100.0 | 11.95M | 141.1 |

Source: U.S. Bureau of the Census, Standard Statistical Establishment List, Special Tabulation, 1990.
[1] Estimated employee size standard based on revenues per employee (except SIC code 8731).
[2] Estimated receipts size standard based on revenues per employee.

The next step in the analysis was to assure that the new size standard would be consistent with all of SBA's size standards as to the way in which those standards in turn relate to industry differences. Failure to take this factor

into account could result in a size standard that would be aberrational in terms of SBA's overall size standards system. This step was an examination of each of the same four industry factors and the existing size standards with respect to two large groups of industries close to either end of the existing size standard spectrum for non-manufacturing industries. To demonstrate this analysis, the paragraph below sets forth the calculations with respect to one of the four industry factors: average firm size. The groups of industries selected for consistency purposes were (1) representative industries covered by a $5 million standard, and (2) representative industries covered by standards of $17 million–$25 million, which have an average of $18.5 million.

This examination revealed that, as to the representative industries covered by the $5 million standard, those industries in the aggregate had an average firm size of $1.15 million, and as to the representative industries covered by standards of $17 million–$25 million, those industries had an average firm size of $3.76 million. In order to identify the relationship between size standards and average firm size in terms of the extent to which differences between average firm size have influenced size standards, SBA used ratios of the size standards between the two groups of industries and the average firm sizes between the two groups. These ratios are expressed as 18.5/5 divided by 3.76/1.15, or 1.13. This number suggests that there is a consistency correlation of 113 percent between average firm size and size standards generally. This means that data which reveals average firm size for a particular industry needs an adjustment by only an added 13 percent before calculating the size standard in order to achieve consistency with the way average firm size relates to size standards as a whole. Table 3 shows the calculations of a "consistency ratio" for average firm size and the other industry factors. The size standards ratio of 3.7 (18.5/5) is a constant in these calculations, and is shown in the description of column (D).

TABLE 3.—CHARACTERISTICS OF SELECTED NON-MANUFACTURING INDUSTRIES

| | (A) Industries with $5M standard | (B) Industries with $17M to $25M standard | (C) Difference ratio (B÷A) | (D) Consistency ratio (3.7÷C) |
|---|---|---|---|---|
| Average Revenues Per Firm | $1.15M | $3.76M | 3.27 | 1.13 |
| Average Assets Per Firm | $0.76M | $2.10M | 2.76 | 1.34 |
| Competition | 25.5% | 41.1% | 1.61 | 2.30 |
| Percent of Revenues by Firm Size Greater Than: | | | | |
| $ 5 Million | 56.2% | 84.8% | 1.51 | 2.45 |
| $18 Million | 36.1% | 59.5% | 1.65 | 2.24 |
| Average | N/A | N/A | 1.58 | 2.35 |

Source: U.S. Bureau of the Census, Special Tabulation, Standard Statistical Establishment List, 1990.

Since average firm size "data" in the case of environmental remediation has to be calculated as a differential figure (see Table 1), the consistency ratios were multiplied by the corresponding difference ratios. For example, the average firm size consistency ratio of 1.13 was multiplied by the average firm size difference ratio of 3.17, for a final size factor of 3.58. Looking back to the weighted average size standards established for the parent industry group of either $12 million or 141 employees, average firm size, as one of only four industry factors, would therefore suggest that for the environmental remediation services industry the size standard should be 3.58 times greater than those parent industry group standards, or approximately $45 million or 500 employees. Similar calculations were performed with respect to each of the other three industry factors. The data are shown in Table 4 below.

TABLE 4.—COMPUTATION OF SUGGESTED ENVIRONMENTAL REMEDIATION SERVICES SIZE STANDARDS

| | (A) Environmental difference ratio | (B) Consistency ratio | (C) Size factor (A×B) | (D) Suggested receipts standard ($12M×C) | (E) Suggested employee standard (141×C) |
|---|---|---|---|---|---|
| Average Revenues Per Firm | 3.17 | 1.13 | 3.58 | $42.9M | 505 |
| Average Assets Per Firm | 3.54 | 1.34 | 4.74 | 56.9M | 668 |
| Competition | 1.26 | 2.30 | 2.90 | 34.8M | 409 |
| Percent of Revenues by Firm Size Greater Than: | | | | | |
| $5 Million | 1.03 | 2.45 | 2.53 | 30.3M | 355 |
| $18 Million | 1.31 | 2.24 | 2.93 | 35.2M | 413 |
| Average | N/A | N/A | N/A | 32.7M | 385 |

Preliminary size standards were suggested by the calculations in table 4 of approximately $42 million or 490 employees. These preliminary size standards reflect an average of the suggested size standards indicated by the four industry factors, without giving one factor more weight than another.

The impact of preliminary size standards of these magnitudes on Federal procurements was also assessed before finally adopting a size standard. This assessment also supported a very high size standard. The primary reason for development of this size standard is to standardize the classification of environmental remediation service activities under one industry size standard for procurement purposes. Information available to SBA shows that a number of full-service Federal remediation projects and site restoration projects, usually multi-year projects, have been projected to fall in the $20 to $30 million range, with some contracts exceeding $100 million. In rate cases

such contracts may even exceed $1.0 billion with prime contractors subcontracting much of the work. These are extraordinarily large contracts for Federal procurements that are not contracts for manufactured goods. In addition to the large size of contracts, there is also an extensive level of sophistication required on these contracts given the concern for public health and safety regarding hazardous materials, and the specialized equipment, personnel and work precautions needed by a contractor when handling hazardous materials. Moreover, since the SBA is requiring that contracts which fall in this category be composed of activities in three industries (as explained below), such contracts would naturally tend to be larger contracts. Relatively large companies will necessarily have to be involved on environmental remediation services contracts given the size and sophistication of Federal government remedial efforts. A very high size standard is thus suggested by the nature of the Federal procurement marketplace and the presence of large firms which tend to dominate these Federal procurement activities. The preliminary size standards of $42 million and 490 employees are consistent with this factor.

Based on the industry analysis and a consideration of the available information on Federal procurement, the SBA has decided to establish a 500 employee size standard for environmental remediation services. As the previous industry analysis shows, a 490 employee size standard adequately reflects the structure of the environmental remediation services industry based on available data on firms engaged in these services. For administrative convenience, the 490 employee level is rounded up to 500 employees to be consistent with other SBA employee-based size standards.

The SBA has decided to adopt number of employees as the size standard measure for environmental remediation services rather than a size standard based on annual receipts, as was proposed. As stated in the proposed rule, the SBA generally utilizes a receipts-based size standard for non-manufacturing industries, but it stated it would consider establishing an employee-based size standard for environmental remediation services if information was provided that indicated the use of a receipts-based size standard would be inequitable. SBA specifically solicited comments indicating the need for an employee-based size standard. In response, SBA received 15 comments which advocated adoption of an employeee-based size standard. Only one comment was received which specifically stated that the size standard should be based on receipt and not member of employees. Other comments supported or opposed the $18 million size standard,but did not discuss specifically whether receipts or employees would be a more equitable means of measuring size. SBA also continued its own assessment of whether a receipts-based or an employee-based size standard would be a better measure of size for this new, emerging industry.

The comments which explained their preference for an employee size standard pointed out that environmental remediation contracts using this size standard would be obtained by contractors who would subcontract out a relatively high proportion of work, and that revenues passed-through to subcontractors should not be attributed to the prime contractor. SBA agrees that there likely will be a very high percentage of subcontracting; this consideration, in combination with the fact that the contracts involved will be extremely large contacts, and the fact that environmental remediation is an emerging industry, suggests that a receipts-based size standard would be less equitable than an employee standard. If a $42 million size standard were established instead of one at 500 employees, a firm which is already generating significant revenues could receive a single environmental remediation contract in an amount close to the size standard and effectively become large for purposes of future contracts, even though one-third or more of the revenues of the contract might be attributed to another firm. This result would hinder the ability of small businesses in this emerging industry to grow and continue to participate in the Federal market. SBA believes it would be inconsistent with the purposes of the small business and minority small business set-aside programs to establish a size standard which would effectively be useful to firms on only one or two contracts before disqualifying them from further benefits from the program. This principle is particularly important for new industries where the small business segment is generally less able to compete effectively due to uncertainties as to market and fast-moving technologies. Moreover, since firms from nine or more industries have the capability to perform some or all of the environmental remediation requirements, the type and amount of activity to be subcontracted will vary considerably by contract and by the capabilities of the prime contractor. Accordingly, SBA doubts that it can establish a receipts-based size standard which reflects a "typical" subcontracting pattern for environmental remediation services.

SBA recognizes that, in other contexts, pass-through revenue by itself has not warranted establishment of an employee-based size standard. Here, the additional factors of the extremely large size of the expected contracts, and the status of environmental remediation services as an emerging industry with its special needs for growth opportunities for small business, have persuaded SBA that an employee-based size standard is appropriate.

**Comments to Proposed Rule**

In response to its proposed rule, the SBA received comments from 69 interested parties. Sixty-two of those comments discussed the proposed size standard. All comments dealing with the appropriate level or type of size standard were carefully considered by SBA, and the discussion above has explained in detail how SBA has selected the size standard of 500 employees. None of the comments presented SBA with credible data which would conflict with SBA's analysis in any significant way, and most comments discussed the proposed size standard in only general terms. Some comments did raise other issues related to the proposal which warrant discussion. Those issues are discussed below:

**Environmental Remediation and the Brooks Act**

A few comments questioned whether SBA's designation of Environmental Remediation Services as a new sub-category under SIC code 8744, Facilities Support Management Services, complied with the Federal Government's selection criteria for awarding architecture and engineering services contracts under the Brooks Act. These comments primarily came from engineering firms and associations. Under the Brooks Act procedures (see Subpart 36.6 of the Federal Acquisition Regulation (FAR), Title 48 of the Code of Federal Regulations), contracts for architecture and engineering services are competed based on the qualifications of architectural and engineering firms. This differs from many of the procedures for most other services where the primary criterion is usually price competition.

Because application of the Brooks Act procedures does not depend on the SIC code assigned to a particular requirement, it is SBA's view that the

establishment of a new sub-category within SIC code 8744 for Environmental Remediation Services will not disturb the Brooks Act determination process. It is a requirement's statement of work and how the requirement is to be performed, and not the SIC code assigned to it, that determines whether Brooks Act procedures should be used. The Brooks Act and Subpart 36.6 of the FAR do not require contracts to be awarded through Brooks Act procedures merely because architects or engineers might do part of the contract work. In this regard, the Brooks Act procedures apply to requirements that include both architect-engineer services and other services "if the statement of work, substantially or to a dominant extent, specifies performance or approval by a registered or licensed architect or engineer," FAR, § 36.601–3(b). As such, architect and engineering services may account for an identifiable portion of a particular requirement without the Brooks Act applying where these services are not substantial or dominant. The SIC code assigned to a requirement will not preclude Brooks Act procedures where the statement of work itself specifies a substantial or dominant amount of work by a registered or licensed architect or engineer. It is the extent of the architect and engineering services to be required by the statement of work that drives that determination. Case law and the Brooks Act's legislative history make clear that contracting officers have a great deal of discretion in determining whether the Brooks Act procedures apply to a particular procurement. See, *e.g.*, H.R. Rep. No. 1070, 100th Cong., 2d Sess. 89, 90, reprinted in 1988 U.S. Code Cong. & Ad. News 5523; *Association of Soil and Foundation Engineers*, B–209547, 83–1 CPD ¶ 551 (May 23, 1983); and *Department of Energy Request for Decision*, B–207849, 82–2 CPD ¶ 63 (July 20, 1982).

It is not uncommon for a single procurement to require more than one product or service. These products or services are often individually associated with different industries and size standards. Where this occurs in connection with an environmental remediation services procurement, this final rule provides explicit guidance as to the classification of the procurement by SIC code based on the principal purpose of the procurement and the relative value and importance of each of the components in the procurement. This guidance, however, refers only to the classification of the procurement for SIC code designation and size standard purposes It leaves undisturbed the possible application of the Brooks Act or the award procedures to be used for the procurement.

**Impact on Small Business Competitiveness Demonstration Program**

A few comments also questioned whether the establishment of the environmental remediation service size standard circumvents the Small Business Competitiveness Demonstration Program (Demonstration Program) by shifting procurements that might otherwise be designated as engineering, construction or refuse systems procurements into the environmental remediation services industry.

The Demonstration Program was established by Title VII of the Business Opportunity Development Reform Act of 1988, Public Law 100–656, 102 Stat. 3853, 3889, to test, over a four-year period, "whether the expanded use of full and open competition will adversely affect small business participation in designated industry categories." It was statutorily extended through September 30, 1996. Four designated industry groups have been identified for inclusion in the program consisting of (1) all construction industries except for dredging; (2) the refuse systems and related services industries within SIC codes 4212 and 4953, but generally not including contracts for dealing with hazardous materials; (3) the architectural and engineering services industries within SIC codes 7389, 8711, 8712, and 8713, but generally not including contracts for military and aerospace equipment, military weapons, marine engineering and naval architecture; and, (4) non-nuclear ship repair.

In general, the Demonstration Program was implemented to remedy the problem of too many set asides in industries where small businesses dominated because agencies overused set asides in those industries. The Demonstration Program targeted the specific industry categories listed above because they were overwhelmingly dominated by small business set asides, suspended the set asides in these specific industry categories, and barred SBA from changing the size standards for these industries.

Pursuant to the Small Business Act, SBA generally has the authority to establish size standards on an industry by industry basis, and particularly for emerging industries. See, 15 U.S.C. sections 632(a) and 644(a). Although the Agency is constrained from changing the size standards for the industries within the Demonstration Program, it is SBA's view that the statutory restriction imposed by the Demonstration Program would not apply to the establishment of a sub-category within SIC code 8744, which is not one of the SIC codes statutorily identified for inclusion in the Program.

Under this rule, a contracting officer may use the newly established Environmental Remediation Services sub-category and accompanying size standard only where (1) a procurement' general purpose is to restore a contaminated environmental area, (2) three or more distinct types of services are required by the procurement, and (3) no single industry accounts for at least 50 percent of the value of the entire procurement. It is our view that where these conditions are met, the requirement loses its identity as one for "construction," "refuse systems," or "architectural or engineering services." Thus, the restriction imposed by the Demonstration Program on changing the size standards for those industries is inapplicable. If a procurement is primarily (i.e., at least 50 percent) engineering, or construction, or refuse cleanup and disposal, it still would be assigned a SIC code in one of those industries and not in the environmental remediation services industry. Such a procurement could be subject to the Demonstration Program. Because of the rule's definition of environmental remediation services, only procurements which have multiple industry activities and which are also designed to restore the environment would be classified properly under the environmental remediation services size standard, and procurements properly classified in industries covered by the Demonstration Program would not be affected by this rule.

Prior to this rule, solicitations requiring environmental remedial services type work have been classified inconsistently and sometimes incorrectly within the Demonstration Program. Some requirements have been classified under one of the SIC codes within the Demonstration Program, even though the requirement actually was for a multi-disciplinary approach to environmental cleanup with most of the work not related to the assigned SIC code.

This rule will have the effect of clarifying that any environmental remediation services requirement for which one component accounts for at least 50 percent of the value of the requirement should be designated under the SIC code for that component. Thus, if that one component is an item covered by the Demonstration Program, the procurement should be assigned a

Demonstration Program SIC code, and the contracting officer should not avoid the Demonstration Program by assigning a different SIC code to match another type of service contained within the requirement. As a consequence of this rule, fewer solicitations will be misclassified because there will be a more accurate classification system for the environmental remediation services requirements.

**The Three Industry Criteria**

Some comments raised concerns regarding the definitional requirement that for a procurement to be designated under the environmental remediation services category and given the applicable size standard, it would have to contain at least three different industry components. Several of the comments argued that the three industry requirement would limit the use of the size standard of environmental remediation services procurements. Several other comments alleged either that the present SIC codes are adequate to classify environmental remediation services procurements or that a three industry criteria would be confusing and result in errors in which procurements would be misclassified by SIC code and size standard. Several comments mentioned that a firm would have to be performing in three or more industries before it could qualify as a small business for environmental remediation services procurements.

For a number of reasons, SBA believes it is appropriate to establish a separate description of environmental remediation services with the requirement that there be three or more activities associated with distinct four-digit SIC codes. First, the available information and data reveal an emerging industry which is characterized by firms that already have multi-disciplinary capabilities related to different aspects of environmental cleanup. Second, environmental remediation procurements frequently include requirements for many different services that need to be interrelated by a single prime contractor. As indicated above, such procurements have been vulnerable to widely divergent approaches by contracting offices as to the proper SIC code classification. Third, the three industry requirement, when combined with the requirement that a single component not exceed 50 percent, ensures that procurements which primarily consist of an activity within the Competitiveness Demonstration Program are so classified rather than as an environmental remediation services requirement

SBA believes that limiting the use of the environmental remediation services size standard to contracts where less than 50 percent of a procurement consists of a particular activity is appropriate. As indicated above, many of the SIC codes which sometimes entail environmental remediation activity are also included within the Competitiveness Demonstration Program. In its desire to accommodate an emerging industry, SBA does not wish to create a size standard which would permit the avoidance of that Program where the majority of the work required would fall under one of the SIC codes covered by the Program. Since an emerging industry exists, which is not adequately defined by an existing SIC code other than SIC code 8744, a further segmentation of that SIC code is required for size standard purposes.

SBA also believes that the three industry criteria will not be confusing to any great extent. The same general criteria apply to the selection process of the size standard for Base Maintenance, a category which the SBA has maintained as a separate component of Facilities Support Management Services for many years without significant confusion.

Comments received on this issue suggest a need to clarify the application of the three industry requirement. The description of environmental remediation services regarding Federal procurements is designed to inform contracting officers as to which procurements should be assigned the size standard. Section 121.902 of SBA's regulations describes the criteria for making SIC designations. A firm qualifying as an eligible small business on an environmental remediation services procurement is only required to meet the size standard for that procurement. It is the contracting officer's responsibility to determine if the eligible small business is capable of performing the various requirements of the procurement, and whether that firm intends to perform all of the activities associated with the procurement or to subcontract one or more activities to another firm.

For other SBA programs, such as the "7(a) General Business Loan Program," the size standard would be based on a firm's primary industry activity. A firm citing environmental remediation services as its primary industry would have to demonstrate that it currently operates in three or more industries and that no one industry accounts for 50 percent or more of its total business activity.

**Multiple Size Standards**

A few comments recommended a two-tier standard for environmental remediation services in which "technical or professional" environmental remediation services would have a different size standard from "non-professional and non-technical remediation" services. These comments generally recommended a size standard of $18 million to $25 million for non-professional remediation services, but disagreed on the size standard for professional environmental services. Some believed a size standard lower than $18 million would be appropriate to assist small businesses, while others recommended $25 million or 750 employees to increase procurement opportunities for small businesses. Other comments recommended establishing a separate size standard within many industries which sometimes perform activities related to environmental services, rather than a single environmental remediation size standard under SIC code 8744. SBA believes that either the establishment of two separate environmental remediation services size standards, or the establishment of a separate environmental size standard within a number of related industries, would be unwarranted and would add needless complexity and confusion to SBA's size standards.

The SBA generally establishes size standards by four-digit SIC code, unless a segment of an industry possesses unique characteristics which make the size composition of firms within that industry segment substantially different from other firms in the industry. The SBA believes this to be the case for environmental remediation services. To go further and create yet another segmentation within environmental remediation services would be unprecedented and unnecessary. The SBA lacks any significant data suggesting that a further differentiation within this industry is needed to reflect different characteristics divided along professional versus non-professional lines.

To create a new segmentation of each of the nine SIC codes primarily associated with environmental remediation would be impractical, would add substantial and needless complexity to the size standard system, and would undercut SBA's ongoing efforts to simplify and consolidate size standards, where appropriate. As indicated above, the purpose of this size standard is to establish a definition of small business for an emerging industry where very large firms dominate the

industry, and where Federal procurements tend to be large scale, multi-activity contracts. While other types of environmentally related procurements usually will have a scope of work confined to one industry activity and be smaller procurements. This generally is not the case for environmental remediation services.

**SIC Code Selection**

Several comments expressed concern that a misclassification of procurements by SIC code (and, therefore the size standard associated with the SIC code) by a contracting agency would occur if the nature of a procurement had to be determined before the actual scope of work for each activity would be known. For example, a contracting officer reasonably could believe that at least three distinct SIC codes were involved, or that no SIC code would comprise more than 50 percent of contract activities before contract award, but actual contract performance would reveal a different pattern of work. These comments warned that a dichotomy between pre-contract expectations and actual contract performance experiences would result in an increased level of protests.

The SBA recognizes that the actual distribution of work on a multiple-activity procurement may differ from the anticipated distribution. Nonetheless, contracting officers presently must use their best judgment in designating a SIC code for a procurement based on their knowledge of the work statement associated with the procurement, and the situation for application of this SIC code is no different. Moreover, SBA's experience with the base maintenance size standard, where a similar assessment of work to be performed must be made, has shown the approach to be workable.

**Size Standards on Subcontracts**

Several comments expressed concern as to the proper size standard for a subcontract for environmental remediation services let by a contractor which had been awarded a federal prime contract under a different SIC code. For subcontracts of more than $10,000, current SBA regulations provide that the same procedures for designating the proper SIC code for a Federal prime contract also apply on subcontracts. Thus, if a subcontract is primarily for environmental remediation activities and can be identified with at least three separate SIC industries, none accounting for 50 percent or more of the work, the environmental remediation services size standard of 500 employees would apply. On the other hand, if the subcontract does not have three or more separate industries or one of its industries exceeds 50 percent of the value of the contract, the appropriate size standard would be that of the primary industry and not the environmental remediation industry's size standard. For subcontracts of $10,000 or less, a size standard of 500 employees should be applied regardless of the nature of the work. SBA's size regulations at 13 C.F.R. 121.910–911 discuss the designation of SIC codes and size standards for subcontracting.

*Compliance With Regulatory Flexibility Act, Executive Orders 11612, 12788, and 12866 and the Paperwork Reduction Act*

General

This rule has been reviewed under Executive Order 12866.

Based on all available information, the SBA believes that this final rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Immediately below the SBA has set forth a regulatory impact analysis.

(1) Description of Entities to Which This Rule Applies

Based on SBA's knowledge of the relative importance of environmental remediation activities among the nine industries surveyed in this rule, the SBA estimates that over 1,100 firms would immediately gain eligibility to bid on procurements for this activity competed under various small business and small disadvantaged business procurement preference programs, or would be able to seek assistance under the SBA's financial assistance programs. Of these 1,100 firms, 200 would fall in the $18.0 million to 500 employee (equivalent to approximately $50.0 million) range and be included by SBA's decision to adopt a size standard of 500 employees for this activity rather than the proposed $18.0 million. SBA believes these 1,100 firms are active in environmental remediation, but exceed the size standard of the various environmentally related industries (construction, engineering, refuse collection, etc.) in which procurements have been classified in the absence of an environmental remediation services size standard. Since the size standards for all but one of these industries are less than 500 employees, a number of firms exceeding these industries' size standards would gain eligibility. From a longer term perspective, however, many more firms than the estimated 1,100 firms will eventually be impacted by this rule, as firms expand or shift their capabilities in response to the anticipated growth of federal contracting for environmental remediation efforts.

(2) Description of Potential Benefits of This Rule

The establishment of a size standard of 500 employees would expand procurement opportunities to hundreds of firms previously not considered small and permit Federal agencies to better utilize procurement preference programs for small business and small disadvantaged businesses (SDB) and the SBA's 8(a) Program. The amount of Federal contracting in this area is projected to fall in the billions of dollars on a yearly basis. It is possible that over a ten year period, Federal contracting will exceed $50 billion for this activity. At present, many Federal procurements are not set aside for small firms or reserved for SDB or 8(a) firms because the alternative size standards for environmental work are considered too low, thus restricting small business eligibility to firms without the resources to adequately perform the work. The result is that the preference programs for small businesses are not fully utilized and many contracts which could be set-aside or reserved for small disadvantaged businesses are competed on an unrestricted basis.

In the SBA's Business Loan Program, it is estimated that twelve additional loans amounting to $6 million will be made to firms newly eligible to participate in the program under the 500 employee size standard established by this rule. This fairly small impact occurs because only a small percentage of eligible firms seek financial assistance in this program in any one year, especially firms within the size ranges affected by this rule.

(3) Description of the Potential Costs of This Rule

The potential costs of the establishment of this size standard are expected to be minimal. With respect to the General Business Loan Program, no additional costs to the government should result since all of the SBA's lending authority is established by appropriations which the Agency does not have the authority to exceed.

The costs to the Federal government through the procurement process are also thought to be minimal for two reasons: First, competition between two or more small firms must be present before a contract can be set aside for small business. Second, set-asides are expected to be awarded at reasonable

prices. If competition and reasonable pricing do not exist on a proposed set-aside, the procuring agency is expected to issue an unrestricted procurement. This process suggests that losses in the form of increased costs to the government, if at all, are unlikely to be significant.

In addition, this new size standard is not expected to have significant adverse effect on competition, employment, investment, prices, productivity, innovation or the ability of U.S. based businesses to compete with foreign-based businesses in domestic or export markets. The competitive effects of size standard changes differ from those normally associated with most regulations affecting factors such as prices of goods and services, costs of labor, profits, growth, innovations, mergers and access to foreign trade because no firm is required to respond to a size standard revision.

(4) Description of the Potential Net Benefits of the Rule

From the above discussion, the SBA believes that because the potential costs of this rule are minimal, the potential net benefits (potential benefits minus potential costs) would approximately equal the potential benefits. The impact of the size standard would be concentrated in Federal Procurement.

(5) Legal Basis for This Rule

The legal basis for this rule is sections 3(a), 5(b) and 15(a) of the Small Business Act, 15 U.S.C. 632(a), 634(b)(6) and 644(a).

(6) Federal Rules

There are no Federal rules which duplicate, overlap or conflict with this final rule. The SBA has statutorily been given exclusive jurisdiction in establishing size standards.

(7) Significant Alternatives to This Rule

In compliance with the Regulatory Flexibility Act, the SBA has examined alternatives to the 500 employee size standard established in this final rule. Other alternatives have been considered and rejected as discussed in the supplementary information above.

The SBA certifies that this rule will not impose any requirements subject to the Paperwork Reduction Act of 1980, 44 U.S.C. chapter 35.

The SBA certifies that this rule will not have federalism implications warranting the preparation of a Federalism Assessment in accordance with Executive Order 12612. For purposes of Executive Order 12778, the SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in section 2 of that order.

**List of Subjects in 13 CFR Part 121**

Government procurement, Government property, Grant programs-business, Loan programs-business. Small business.

Accordingly, part 121 of 13 CFR is amended as follows:

**PART 121—[AMENDED]**

1. The authority citation for part 121 continues to read as follows:

**Authority:** 15 U.S.C. 632(a), and 632(b)(6) 637(a), 644(a) and 644(c).

**§ 121.601 [Amended]**

2. Section 121.601, Major Group 87 is amended by revising SIC code 8744 within Major Group 87 to read as follows:

**§ 121.601 Standard Industrial Classification codes and size standards.**

* * * * *

| SIC (* = new SIC code in 1987, not used in 1972) | Description (N.E.C. = note elsewhere classified) | Size standards in number of employees or millions of dollars |
|---|---|---|
| Major Group 87—Engineering, Accounting, Research, Management, and Related Services: | | |
| * * * * * * * | | |
| 8744* | Facilities Support Management Services [19] | $5.0 |
| | Base Maintenance [20] | $20.0 |
| | Environmental Remediation [23] | 500 |
| * * * * * * * | | |

[19] Facilities Management, a component of SIC code 8744, has the following definition: Establishments, not elsewhere classified, which provide overall management and the personnel to perform a variety of related support services in operating a complete facility in or around a specific building, or within another business or Government establishment. Facilities management means furnishing three or more personnel supply services which any include, but are not limited to, secretarial services, typists, telephone answering, reproduction or mimeograph service, mailing service, financial or business management, public relations, conference planning, travel arrangements, word processing, maintaining files and/or libraries, switchboard operation, writers, bookkeeping, minor office equipment maintenance and repair, use of information systems (not programming), etc.

[20] SIC code 8744: If one of the activities of *base maintenance* as defined below, can be identified with a separate industry, and that activity (or industry) accounts for 50 percent or more of the value of an entire contract, then the proper size standard shall be that for the particular industry, and not the base maintenance size standard.

"Base Maintenance" constitutes three or more separate activities. The activities may be either service or special trade construction related activities. As services, these activities must each be in a separate industry. These activities may include, but are not limited to, such separate maintenance activities as Janitorial and Custodial Service, Protective Guard Service, Commissary Service, Fire Prevention Service, Safety Engineering Service, Messenger Service, and Grounds Maintenance and Landscaping Service. If the contract involves the use of special trade contractors (plumbing, painting, plastering, carpentering, etc.), all such specialized special trade construction activities will be considered a single activity, which is Base Housing Maintenance. This is only one activity of base maintenance and two additional activities must be present for the contract to be considered base maintenance. The size standard for Base Housing Maintenance is $7 million, the same size standard as for Special Trade Contractors.

* * * * *

[23] SIC code 8744: For SBA program assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement under SIC code 8744, the following requirements must be met: Such a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition. Such services include, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry shall be that of the particular industry and not the Environmental Remediation Services Industry.

For purposes of classifying a Government procurement as Environmental Remediation Services under SIC code 8744, the following is required: (1) That the general purpose of the procurement is to restore a contaminated environment; and (2) that the procurement is composed of activities in three or more separate industries identified with separate Standard Industrial Classification four-digit industry codes or, in some instances (e.g., engineering), smaller sub-components of four-digit industry codes with separate, distinct size standards. These activities may include, but are limited to, separate activities in industries such as: Heavy Construction; Special Trade Construction; Engineering Services; Architectural Services; Management Services; Refuse Systems; Sanitary Services, Not Elsewhere Classified; Local Trucking Without Storage; Testing Laboratories; and Commercial, Physical and Biological Research. If any activity in the procurement can be identified with a separate four-digit industry code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard shall be the one for that particular industry, and not the Environmental Remediation Service size standard.

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Dated: September 8, 1994.

**Cassandra M. Pulley,**

*Deputy Administrator.*

[FR Doc. 94–22677 Filed 9–14–94; 8:45 am]

BILLING CODE 8025–01–M

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Airspace Docket No. 94–AEA–08]**

## Modification of Class D Airspace and Establishment of Class E Airspace; Various Locations, State of New York

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This action modifies the Class D airspace areas at Elmira, NY, Poughkeepsie, NY, and Utica, NY, by amending the areas' effective hours to coincide with the associated control tower's hours of operation. This action also establishes Class E airspace at these areas when the associated control tower is closed. Additionally, this action establishes Class E airspace areas at Ithaca, NY, Niagara Falls, NY, and White Plains, NY. Presently, these areas are designated as Class D airspace when the associated control tower is in operation. However, controlled airspace to the surface is needed when the control towers located at these locations are closed. The intended effect of this action is to clarify when two-way radio communication with these air traffic control towers is required and to provide adequate Class E airspace for instrument approaches when these control towers are closed.

**EFFECTIVE DATE:** 0901 U.T.C. December 8, 1994.

**COMMENT DATE:** Comments must be received on or before October 15, 1994.

**ADDRESSES:** Send comments on the rule in triplicate to: Manager, Air Traffic Division, AEA–500, Airspace Docket Number 94–AEA–08, F.A.A. Eastern Region, Fitzgerald Federal Building # 111, John F. Kennedy International Airport, Jamaica, New York 11430. The official and the informal docket may also be examined during normal business hours at the address listed above.

**FOR FURTHER INFORMATION CONTACT:** Mr. Frank Jordan, Airspace Specialist, System Management Branch, AEA–530, F.A.A. Eastern Region, Fitzgerald Federal Building # 111, John F. Kennedy International Airport, Jamaica, New York 11430; telephone: (718) 553–0857.

**SUPPLEMENTARY INFORMATION:**

### Request for Comments on the Rule

Although this action is a final rule, and was not preceded by notice and public procedure, comments are invited on the rule. This rule will become effective on the date specified in the "DATES" section. However, after the review of any comments, and, if the FAA finds that further changes are appropriate, it will initiate rulemaking proceedings to amend the regulation or to extend the effective date of the rule.

Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in evaluating the effects of the rule, and in determining whether additional rulemaking is required. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the rule that might suggest the need to modify the rule.

### The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) modifies the Class D airspace areas at Elmira, NY, Poughkeepsie, NY, and Utica, NY, by amending the areas' effective hours to coincide with the associated control tower's hours of operation. This action also establishes Class E airspace at these areas when the associated control tower is closed. Prior to Airspace Reclassification, an airport traffic area (ATA) and a control zone (CZ) existed at these airports. However, Airspace Reclassification, effective September 16, 1993, discontinued the use of the term "airport traffic area" and "control zone," replacing them with the designation "Class D airspace." The former CZ's were continuous, while the former ATA's were contingent upon the operation of the associated air traffic control tower. The consolidation of the ATA and CZ into a single Class D airspace designation makes it necessary to modify the effective hours of the Class D airspace to coincide with the control tower's hours of operation. This action also establishes Class E airspace during the hours the control tower is closed. Additionally, this action establishes Class E airspace areas at Ithaca, NY, Niagara Falls, NY, and White Plains, NY. Currently, this airspace is designated as Class D when the associated control tower is in operation. Nevertheless, controlled airspace to the surface is needed for IFR operations at Ithaca, NY, Niagara Falls, NY, and White Plains, NY, when the control towers are closed. The intended effect of this action is to clarify when two-way radio communication with these air traffic control towers is required and to provide adequate Class E airspace for instrument approach procedures when these control towers are closed. As noted in the Airspace Reclassification Final Rule, published in the **Federal Register** on December 17, 1991, airspace at an airport with a part-time control tower should be designated as a Class D airspace area when the control tower is in operation, and as a Class E airspace area when the control tower is closed (56 FR 65645).

The coordinates for this airspace docket are based on North American Datum 83. Class D and E airspace designations are published in Paragraphs 5000, 6002, and 6004, respectively, of FAA Order 7400.9B